84-1901

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD T. WHALEN,
Appellant

v.

DEAN STEEL ERECTION COMPANY, INC.,
Appellee

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

MOTION TO DISMISS

Thomas G. Bell, Jr.
TIMBERLAKE, SMITH,
THOMAS & MOSES, P.C.
25 North Central Ave.
Post Office Box 2566
Staunton, VA 24401
(703) 885-1517

Counsel for Appellee

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION	2
1. The Constitutional argument raised by Whalen has been previously raised and has been rejected by this Court.	2
2. The Virginia Worker's Compensation Act does not deny Whalen due process or equal protection of the laws.	6
CONCLUSION	13
CERTIFICATE	14

TABLE OF AUTHORITIES

CASES

Bergen v. Fourth Skyline Corporation, 501 F.2d 1174 (4th Cir., 1974) 6

Danna v. Economy Heat & Air Savers, 663 P.2d 395 (Okla. App. 1983) 12

Employers Ins. of Wausau v. Abernathy, 440 So.2d 953 (Fla. 1983) 12

Feitig v. Chalkley, 185 Va. 96, 38 S.E. 2d, 73 (1948) 9,10

Haynes v. James H. Carr, Inc, 427 F.2d 700 (4th Cir.) Cert. Denied, 400 U.S. 942 (1970) 5,6

Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 359 N.E. 2d 125 (1977) 12

Levy v. Louisiana, 391 U.S. 68 (1968) 8

Morey v. Doud, 354 U.S. 457 (1957) 8

Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) 7

New York Central R.R. Co. v. White, 243 U.S. 219 (1917) 7

Northern Pacific Railway Co. v. Meese, 239 U.S. 614 (1915) .... 3,6,8, ... 13

CODE SECTIONS

Section 65.1-30, Code of Virginia 11

Section 65.1-40, Code of Virginia 8

Section 65.1-41, Code of Virginia 9

Section 65.1-103, Code of Virginia 2,9

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD T. WHALEN,
Appellant

v. Case No. 84-1901

DEAN STEEL ERECTION
COMPANY, INC.,
Appellee

MOTION TO DISMISS

Appellee, Dean Steel Erection Company, Inc., moves the Court to dismiss the appeal of Edward T. Whalen for failure to present a substantial federal question, because the issues raised by Appellant have been previously decided by the rulings of this Court and were properly decided below.

PRELIMINARY STATEMENT

Appellee concurs in the Question Presented, the List of Parties, the Opinions Below, and the Statement of Jurisdiction presented by the Appellant.

It concurs in the Constitutional and Statutory Provisions Involved, but would add the following statute:

> Code of Virginia (1950), §65.1-103. Duty to insure payment of compensation; effect of insurance.--Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified. . . .

Appellee concurs in the Statement of the Case presented by Appellant, except to the extent that it constitutes argument. Appellant will hereinafter be referred to as "Whalen". Appellee will hereinafter be referred to as "Dean Steel".

THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

1. The Constitutional argument raised by Whalen has been previously

raised and has been rejected by this Court.

Whalen challenges the constitutionality of the Virginia Worker's Compensation Act on the basis that it provides protection from a common law personal injury suit to Dean Steel even though Dean Steel as a subcontractor of Whalen's employer has no potential liability to Whalen for worker's compensation benefits. Whalen argues that a party can only be protected from a common law personal injury suit if that party is either primarily or contingently liable for the payment of worker's compensation benefits.

This Court considered and rejected such a claim in the early days of worker's compensation statutes in Northern Pacific Railway Co. v. Meese, 239 U.S. 614 (1915). In that case, Meese was killed in the course of his

employment by a Seattle brewer, allegedly as the result of the negligence of Northern Pacific Railway Co. His heirs brought suit against the railway company. The railway company claimed protection of the Washington Worker's Compensation Act which provided that it was the sole remedy for injured workmen and provided immunity from suit for all entities if the injury occurred in the workplace.

This Court rejected Meese's contention that extending protection from suit to the railway company, which was neither his employer nor connected in any way with his job, violated the Equal Protection Clause of the Fourteenth Amendment. It held that a state could in the proper exercise of its legislative power give protection from suit to a defendant who had no liability for worker's compensation payments.

The Meese case, which is cited by the Court below, is ignored by Whalen, though he raises precisely the same question.

The challenge presented by Whalen to the Virginia Worker's Compensation Act has twice been considered and rejected in recent years by the Court of Appeals for the Fourth Circuit. In Haynes v. James H. Carr, Inc., 427 F.2d 700 (4th Cir.) Cert. Denied, 400 U.S. 942 (1970), Whalen's argument was rejected in a case which is indistinguishable on its facts from the present case. Haynes was a carpenter employed by a general contractor. A roof truss fell and injured him. He brought suit against Carr, who had constructed and erected the roof truss. The Fourth Circuit concluded that "Haynes' argument that the Virginia Workmen's Compensation Act is unconstitutional is foreclosed by

Northern P. Ry. v. Meese, 239 U.S. 614, 620, 36 S. Ct. 223, 60 L. Ed. 467 (1916)."

A petition for certiorari was rejected in the Haynes case.

Again in 1974, the Fourth Circuit rejected Whalen's argument in Bergen v. Fourth Skyline Corporation, 501 F.2d 1174 (4th Cir., 1974).

Since this Court rejected Whalen's constitutional argument in 1915 and declined to reconsider it in 1970, the constitutionality of the Virginia statute which protects Dean Steel from common law suit is well established. No substantial federal question is raised.

2. The Virginia Worker's Compensation Act does not deny Whalen due process or equal protection of the laws. A basic component of most, if not all, worker's compensation acts is a compromise by which an injured worker

receives benefits, which are limited by statute, regardless of whether the employer is at fault and, in return, gives up his common law right to file a personal injury suit. Whalen has participated in the compromise by receiving extensive worker's compensation benefits.

This basic trade-off has long since withstood attack on due process grounds. New York Central R.R. Co. v. White, 243 U.S. 219 (1917), Mountain Timber Co. v. Washington, 243 U.S. 219 (1917). The fact that Whalen has access to worker's compensation benefits for his on-the-job injury satisfies due process requirements and precludes any argument that he has been deprived of his right to sue without receiving anything in return.

The thrust of Whalen's constitutional argument is based in the equal

protection clause contained in the Fourteenth Amendment. Even without the rejection of his argument in Northern Pacific Ry. v. Meese, supra, his claim is without merit.

The test to be applied has been stated often. States have broad power and discretion to make classifications so long as they are reasonably related to the purposes for which a statute is adopted, are not purely arbitrary, and have a rational basis. Classifications may not be invidiously discriminatory. Morey v. Doud, 354 U.S. 457, 463-465 (1957), Levy v. Louisiana, 391 U.S. 68, 71 (1968). The classification made by the Virginia statute easily passes the established test.

Section 65.1-40 of the Code of Virginia, 1950, (Jurisdictional Statement, p.3) provides that an employee who accepts worker's compensation benefits

gives up "all other rights and remedies . . . at common law or otherwise, on account of such injury . . . ". This broad prohibition is narrowed by §65.1-41 of the Code of Virginia, 1950, (Jurisdictional Statement pp.2-3) allowing the injured employee and his employer together to pursue such rights and remedies against "any other party." Section 65.1-103 of the Code of Virginia, 1950, extends the protection of the Act to the employers of injured workers and "those conducting his business," making it clear that the protection extends to subcontractors and others beyond the direct employer.

In the 1948 case of Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 73 (1948) the Supreme Court of Virginia first set forth its test to determine who would be protected from suit as "those conducting [the] business" of an

employer and who would be an "other party" and not protected. Interpreting the statute, the Court concluded that all persons or entities engaged in the trade, business or occupation of a general contractor would be protected, but that those who were "strangers to the business" would not be. 185 Va. at 102, 38 S.E.2d at 75-76.

In the four decades following Feitig v. Chalkley, supra, the Virginia Court has consistently applied the test, determining on a case by case basis whether or not alleged tortfeasors were engaged in the work of the injured worker's employer. Many of those cases are cited in the opinion below.

As discussed in the opinion below, the Virginia Worker's Compensation Act has created a canopy and has placed under it all employees engaged together on an industrial project regardless of

the identities of their direct employers and has extended the protection of the Worker's Compensation Act to those employers under the canopy. It has not extended the protection to those not engaged in a particular project and thus outside the canopy. It treats all persons working on an industrial project alike, regardless of the status of their direct employers as general contractors or subcontractors. Clearly this classification has a rational basis -- to have the Act apply exclusively to those on the job, but not to those unrelated to it. It is, therefore, immune from constitutional attack.

The result urged by Whalen would, in fact, create a discriminatory classification. If the general contractor would be immune from suit because of his status as statutory employer of all workers on the project (Virginia Code

Section 65.1-30) and subcontractors were not immune, workers laboring together toward a common goal but on the payroll of different employers would be treated differently, some able to sue and others not. That classification would not have a rational basis.

The state law cases cited by Whalen simply do not apply. Two of them, Employers Ins. of Wausau v. Abernathy, 440 So.2d 953 (Fla. 1983) and Danna v. Economy Heat & Air Savers, 663 P.2d 395 (Okla. App. 1983) are not decided on constitutional grounds but on interpretations of state statutes. The third, Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 359 N.E. 2d 125 (1977) involved a classification which discriminated on the basis of whether or not employers similarly situated had insurance. It has no application here.

The Virginia statutory scheme does

not deny equal protection of the laws or due process to injured Virginia workers. It withstands attack independently of the decision in Northern Pacific Ry. v. Meese, supra.

CONCLUSION

For the reasons stated, Appellee, Dean Steel Erection Company, Inc., moves the Court to dismiss this appeal as not presenting a substantial federal question and as having been properly decided below.

Respectfully submitted,

Thomas G. Bell, Jr.

Thomas G. Bell, Jr.
Timberlake, Smith, Thomas
& Moses, P.C.
Post Office Box 2566
Staunton, VA 24401

Counsel of Record for
Appellee Dean Steel Erection
Company, Inc.

CERTIFICATE

This is to certify that I have this day served three copies of the foregoing Motion to Dismiss upon counsel for the opposing party pursuant to Rule 33(3) of the Rules of the Supreme Court of the United States, by mailing three copies in an envelope addressed to: Gary W. Kendall, Michie, Hamlett, Donato & Lowry, Post Office Box 298, Charlottesville, VA, 22902, and James A. Eichner, Beale, Eichner, Wright, Denton & Balfour, 1 North Fifth Street, Richmond, VA, 23219.

Given under my hand this 28th day of June, 1985.

Thomas G. Bell, Jr.

Thomas G. Bell, Jr.